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Plaintiff,	
KELLY CHESLER	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY Docket No. **HUD-L-4722-18**
vs.	
Defendants,	
CITY OF JERSEY CITY; CITY OF JERSEY COUNCIL; CITY OF JERSEY CITY BUSINESS ADMINISTRATOR, MARK BUNBURY, (in his official capacity) CHIEF OF POLICE MICHAEL KELLY (in his official capacity); MAYOR STEVEN M. FULOP, (in his official capacity)	Civil Action

BRIEF SUBMITTED ON BEHALF OF PLAINTIFF, KELLY CHESLER, IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS HER COMPLAINT

On the Brief
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PRELIMINARY STATEMENT

Plaintiff Kelly Chesler ("Plaintiff" or "Chesler") a Lieutenant in the Jersey City Police Department ("JCPD") was named in a criminal indictment (the "Indictment") issued on June 14, 2016. Chesler was contemporaneously served with a Notice of Immediate Suspension, a Preliminary Notice of Disciplinary Action ("PNDA") and a Final Notice of Disciplinary Action ("FNDA") providing for her indefinite suspension pending these criminal charges.

On October 23, 2018, all criminal charges against Chesler were dismissed. Chesler's demands to the City of Jersey City (the "City") for statutorily compelled reimbursement of back pay and attorney's fees were initially met with requests for additional information but, ultimately, ignored. As a result, Chesler filed the pending Complaint in Lieu of Prerogative Writ (the "Complaint").

While the JCPD now contends there is an ongoing disciplinary investigation of Chesler, it cannot be disputed that the JCPD has failed to file charges against Chesler within the forty-five (45) day time limit set forth by N.J.S.A. 40A:14-147 commonly known as the 45 Day Rule. Nevertheless, the JCPD blithely claims the right to continue its "investigation" of Chesler arguing that she must await the result of the JCPD's illegal investigation and then seek relief in an administrative action at some unknown future date. The

City's above-the-law mentality is underscored in the City's motion to dismiss Chesler's Complaint which does not even deign to mention N.J.S.A. 40A:14-147 let alone explain why the JCPD is exempt from it. Accordingly, the fundamental question presented to the Court is whether the JCPD is subject to the laws of the State of New Jersey or is it to be recognized as a Kingdom unto itself?

STATEMENT OF FACTS

Plaintiff, Jersey City Police Lieutenant Kelly Chesler ("Plaintiff" or "Chesler") was hired by the Jersey City Police Department in November, 1998.

On or about March 11, 2015, Chesler filed a seven (7) count civil complaint in the United States District Court of New Jersey alleging violations of 42 U.S.C. §1983, New Jersey's Conscientious Employee Protection Act, New Jersey's Civil Rights Act and the New Jersey Law Against Discrimination naming defendants, the City of Jersey City (the "City") and certain individuals including the then Public Safety Director and Chief of Police. See, Certification of Jeffrey G. Garrigan, Esq. ("Garrigan Cert.") at Exhibit A.

On June 16, 2016, Chesler was criminally indicted along with three other police officers based upon allegations made by one of the defendants in Chesler's civil lawsuit. Chesler was charged with twenty (20) counts alleging Conspiracy to Commit Theft by Deception; Theft by Deception; Falsifying Records; Official Misconduct; and Pattern of Official Misconduct (the "Criminal Case"). Id. at Exhibit B.

On June 14, 2016 Chesler was served with a Notice of Immediate Suspension without Pay and a Preliminary Notice of Disciplinary Action ("PNDA") by the Jersey City Police Department ("JCPD"). Id. at Exhibit C. On July 7, 2016, Chesler was served with a Final Notice of Disciplinary Action ("FNDA") providing for her "(i)

indefinite suspension pending criminal charges...". Id. at Exhibit D.

On June 15, 2016, by letter to the City's Business Administrator, Chesler requested that the City provide her with a defense in the Criminal Case pursuant to N.J.S.A. 40A:14-155. The City responded by letter dated June 22, 2016 denying Chesler's request. Id. at Exhibit E.

The Criminal Case began trial on September 5, 2018 but, on October 23, 2018, was dismissed with prejudice following the State's admitted inability to prove any criminal wrongdoing by Chesler. By letter dated October 26, 2018, Assistant Prosecutor Peter Stoma advised the JCPD of the dismissal of the Criminal Case. Id. at Exhibit F.

By letter dated October 24, 2018 Chesler requested back pay and reimbursement of attorney's fees. Id. at Exhibit G. By letter dated October 31, 2018 the City requested additional documentation regarding Chesler's mitigation of her losses. Id. at Exhibit H. Chesler provided additional information by letters dated November 7th and 12th, 2018. Id. at Exhibit I. The City provided no further response and, on November 29, 2018, Chesler filed the pending Complaint. Id. at Exhibit J.

The Criminal Case was concluded more than one hundred(100) days ago. As of this date, the JCPD has failed to issue disciplinary charges against Chesler. Id. at ¶4.

LEGAL ARGUMENT

I. THE JCPD IS STATUTORIY BARRED FROM ISSUING DISCIPLINARY CHARGES AGAINST CHESLER

N.J.S.A. 40A:14-147, commonly known as the 45 Day Rule, states, in pertinent part, that:

> A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. The 45 day time limit shall not apply if an investigation of a law enforcement for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent violation of the criminal laws of this State. ***The 45-day limit shall begin on the day after the disposition of the criminal investigation. A failure to comply with said provision as to the service of the complaint is to be filed shall require a dismissal of the complaint.***

N.J.S.A. 40A:14-147 (emphasis added).

The language and construct of the statute is clear. In an investigation not alleging criminality, disciplinary charges must be filed within 45 days of the investigating entity having obtained sufficient information upon which to base the complaint. This calculus, however, changes when the potential charges are subsumed within a criminal investigation. In that circumstance, there is a strict 45 day window for the issuance of disciplinary charges beginning the day after the disposition of the criminal investigation. In Grubb v. Borough of Hightstown, 331 N.J. Super.

398, 405 (Law Div. 2000), *aff'd* 353 N.J. Super. 333 (App. Div. 2002) it was explained that:

> The statute provides a simple and uncomplicated procedural mechanism for the handling of administrative charges against a police officer. Pursuant to this statute, an administrative charge against a police officer must be filed within 45 days after the date on which the department obtains "sufficient information" to file the complaint. ***The 45 day time limit is subject to an exception, however, where there is a concurrent investigation of the officer for a violation of the criminal laws of the state. When there is a criminal investigation, the 45-day limit begins on the day after the disposition of the criminal investigation.***

Grubb, supra at 405 (emphasis added). See also, Aristizibal v. City of Atlantic City, 380 N.J. Super. 405, 428 (Law Div. 2005) and Grill v. City of Newark, 311 N.J. Super. 149, 157 (Law Div. 1997) (analogizing the 45 day time limit to a statute of limitations in determining that issuance of charges by means of certified mail within the 45 day time limit satisfied the statute), and also, Palumbo v. Township of Old Bridge, 243 N.J. Super. 142, 150 (App. Div. 1990) (remanding matter to determine date upon which criminal investigation was terminated so as to determine whether disciplinary charges were filed more than 45 days thereafter such that "the statutory time bar applies").

The "bright line" rule that disciplinary charges be issued within 45 days of notice of the conclusion of a criminal investigation or proceeding, as articulated in Grubb and Gill,

stands as a well accepted statement of statutory construction. See, Jones v. City of Millville Police Dep't, 2011 N.J. Super. Unpub. LEXIS 2812 (2011). See, Garrigan Cert. at Exhibit K. ("Here, MPD was notified that the criminal investigation concluded on February 15, 2008, and served Jones with disciplinary charges on March 19, 2008. Thus, the judge correctly found that charges were brought within the 45 day time period and denied Jones' motion to dismiss"); and also, Wahba v. Franklin Twp., 2012 N.J. Super. Unpub. LEXIS 2292 (affirming the trial court's factual determination as to date of disposition of the related criminal investigation and its legal conclusion that any disciplinary charges were required to "...have been filed no later than forty-five days" after that date.). Id. at Exhibit L.

Herein, the October 26, 2018 letter from Deputy First Assistant Prosecutor Peter H. Stoma to Deputy Chief Mark Miller advising that the criminal charges against Chesler had been dismissed with prejudice indisputably advised the JCPD that the criminal proceeding had concluded. Accordingly, the JCPD was required to file any disciplinary charges against Chesler by no later than 45 days "after the disposition of the criminal investigation" that outside date being December 10, 2018.

No disciplinary charges were timely filed against Chesler. The (patently ridiculous) affidavit of Lt. Robert Sjosward ("Sjosward") that an "expeditious" investigation is ongoing and no decision has

been made as to the issuance of charges is of no moment.[1] The decision that no charges may be filed has already been made by operation of N.J.S.A. 40A:14-147. Certainly, it is not too much to ask that an entity created to enforce the rule of law be subject to it as well.

A. Jersey City Is Statutorily Obligated To Provide Chesler All Pay Withheld During Her Period Of Suspension

Following her indictment on June 14, 2016, Chesler was suspended from the JCPD without pay. On October 23, 2018, following the dismissal of all criminal charges with prejudice, Chesler was reinstated to her position.

N.J.S.A. 40A:14-149.2 provides that:

> If a suspended police officer is found not guilty at trial, the charges are dismissed or the prosecution is terminated, said officer shall be reinstated to his position and shall be entitled to recover all pay witheld during the period of suspension ***subject to any disciplinary proceedings or administrative action.***

Id. (emphasis added)

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[1] The Sjosward affidavit indisputably raises issues well outside the four corners of the Complaint and, therefore, permits pertinent additional material to be presented in response. See, R. 4:6-2(e). To that end, it is fairly noted that while Sjosward claims the investigation has "expeditiously" proceeded, he also avers that the interview of fact witness Michael Maietti ("Maietti") was not conducted until January 16, 2019 more than a month beyond the 45 day charging deadline. Additionally, Maietti had already given a 154 page statement on October 17, 2017 during the criminal trial as to which the JCPD was well aware. See, Garrigan Cert. at Exhibit M.

By letter dated October 24, 2018 counsel for Chesler advised Jersey City as to the dismissal of criminal charges and Chesler's entitlement to back pay. Id. at Exhibit G. Jersey City responded, by letter dated October 31, 2018, with a request for mitigation information for the relevant time periods stating "(u)pon receipt of this information we will be in a position to provide you with what we believe is an accurate accounting of the amount owed to Lt. Chesler, pursuant to N.J.S.A. 40A:14-149.2." See, Id. at Exhibit H.

Chesler's counsel duly provided the requested information by letters dated November 7th and 12th, 2018. Id. at Exhibit I. To date, Jersey City has failed to provide payment, a proposed accounting or a request for additional information.

As set forth in N.J.S.A. 40A:14-149.2, the only legitimate basis for failing to provide Chesler with back pay would be the existence of related "disciplinary proceedings or administrative action." As demonstrated supra, the JCPD is prohibited by operation of law from instituting any such proceedings or action against Chesler. The City's petulant refusal to abide by the law reeks of bad faith. Simply put, it is time for Jersey City to pay up.

B. Jersey City Is Statutorily Obligated To Reimburse Chesler For The Legal Fees And Costs Associated With Her Defense In the Criminal Matter

As previously noted, by letter dated October 24, 2018, Chesler's counsel made the City aware of the dismissal of all criminal charges and of Chesler's entitlement to back pay and

reimbursement of counsel fees and costs. By letter dated October 31, 2018, the City responded, as to the issue of counsel fees, as follows:

> With respect to your client's claim under N.J.S.A. 40A:14-155, prior to initiating any litigation to collect these fees and costs, we would ask that (sic) allow us time to complete our review of the issues presented. ***We anticipate being in a position to provide a substantive response to the claim for counsel fees and costs associated with the criminal trial within the next few weeks.***

See, Id. at Exhibit H (emphasis added).

No "substantive" or other response was timely provided by the City necessitating, in part, the filing of this Complaint.[2]

Jersey City's obligation to provide Chesler reimbursement of defense costs is, once again, explicitly commanded by statute. N.J.S.A. 40A:14-155 states, in relevant part, that:

> Whenever a member or officer of a municipal police department or force is a defendant in any action or legal proceeding arising out of and directly related to the lawful exercise of police powers in the furtherance of his official duties, the governing body of the municipality shall provide said member or officer with necessary means for the defense of such action or proceeding, but not for his defense in a disciplinary proceeding

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[2] The assertion in the City's brief that Chesler's counsel "...responded with the mitigation documents but failed to provide the sum of defense costs sought" misrepresents the facts to this Court. See, Defendant's brief at p.5. As previously noted, the City's reply letter of October 31st did request mitigation information as to Chesler (which was provided) but ***did not*** request additional information as to defense costs. Id. at Exhibit H.

> instituted against him by the municipality or in criminal proceeding instituted as a result of a complaint on behalf of the municipality. If any such disciplinary or criminal proceeding instituted by or on complaint of the municipality shall be dismissed or finally determined in favor of the member or officer, he shall be reimbursed for the expense of his defense.

Having called the dance by refusing to provide Chesler means for her defense, the City must now pay the piper in the form of her reasonable costs of defense. The City's half-hearted argument that reimbursement of legal fees must first abide a theoretical disciplinary action and then await conclusion of an extenuated administrative proceeding lacks any basis in logic or law.

Any such argument is premised upon the viability of the threatened disciplinary action. As amply demonstrated, the JCPD is out of time and barred by law from instituting any such disciplinary charges. Accordingly, the City's attempt to hold Chesler's right to reimbursement hostage on that basis is offensive to the most rudimentary concept of justice. Furthermore, the City has not articulated why even the timely filing of new disciplinary charges would justify a refusal to provide reimbursement as to the concluded criminal matter.

There is no language within N.J.S.A. 40A:14-155 stating or even suggesting that counsel fee claims arising from criminal proceedings are to be determined by administrative review. Not surprisingly, there are numerous reported decisions wherein the Law

Division of the Superior Court determined the appropriateness of a fee sought pursuant to N.J.S.A. 40A:14-155. See, Gordon v. Borough of Middlesex, 268 N.J. Super. 177 (App. Div. 1993); Moya v. New Brunswick, 90 N.J. 491 (1982); and Monek v. Borough of S.River, 354 N.J. Super. 442 (App. Div. 2002).

Comparatively, the provision of the Administrative Code which specifically addresses counsel fees which may be awarded by the Civil Service Commission makes no reference to awards relating to criminal proceedings. Instead, N.J.A.C. 4A:2-2.12 states, in relevant part, that:

> (a) The Civil Service Commission shall award partial or full reasonable counsel fees ***incurred in proceedings before it and incurred in major disciplinary proceedings at the department level*** where an employee has prevailed on all or substantially all of the primary issues before the Commission.

The criminal case in which Chesler was exonerated was, of course, neither a matter before the Civil Service Commission/Office of Administrative Law nor a department level major disciplinary proceeding.

Of course, it would make little sense for a fee application arising from a criminal trial to be determined by the Civil Service Commission as that administrative body possesses neither expertise nor experience in criminal law. Accordingly, Chesler's claim for reimbursement of legal fees stands properly before this court separate and apart from her claim for back wages.

II. THIS COURT HAS AND SHOULD MAINTAIN JURISDICTION OVER THIS MATTER IN THE INTERESTS OF JUSTICE

The City seeks nothing but delay in its attempt to have the Complaint dismissed pursuant to R. 4:6-2 and this matter relegated (at some unknown future date) to the administrative system. The facts, however, militate against mechanical application of the rule favoring exhaustion of administrative remedies.

That tenet of law is posited upon certain assumptions as follows:

> The exhaustion requirement serves three primary goals: (1) it ensures that claims are initially heard by the body with expertise in the area; (2) it produces a full factual record facilitating meaningful appellate review; and (3) it conserves judicial resources because the agency decision may satisfy the parties.

Borough of Seaside Park v. Comm'r of N.J. Dept. of Educ., 432 N.J. Super. 167 (App. Div. 2013).

The sole basis offered by the City for its failure to pay Chesler's back pay is its assertion that there is an ongoing investigation which might result in the issuance of disciplinary charges. This is explained by the investigating officer Lieutenant Robert Sjosward as follows:

> 9. At its current stage of investigation our office is conducting interviews and evaluating the record. A decision as to whether disciplinary charges will be brought has not yet been made.

Sjosward Affidavit at ¶9.

Accordingly, the threshold issue presented, be it to the Civil Service Commission or the Superior Court-Law Division, is whether the JCPD is prohibited from filing any such action by the 45 day time bar set forth in N.J.S.A. 40A:14-147. This being so, none of the benefits obtained by administrative review are served in this matter.

It cannot reasonably be argued that the claim would be heard by a body with superior subject matter expertise, as statutory construction is more appropriately conducted in the Superior Court. Additionally, there is no need to develop a fuller factual record as the date when the criminal matter was concluded is undisputed. A determination of the cut-off for filing disciplinary charges merely necessitates the use of a calendar to determine when the permitted 45 days has expired. Finally, as this matter can be decided by simple arithmetic as to both the expiration of the 45 day time limit and the appropriate amount of back pay and attorney's fees, dismissal provides no material savings of judicial resources.

The preference favoring exhaustion of administrative remedies is neither jurisdictional nor absolute. Gripenburg v. Twp. of Ocean, 220 N.J. 239 (2015). Recognized exceptions include "...when the administrative remedies would be futile, when irreparable harm would result...or when an overriding public interest calls for a prompt judicial decision." Ibid. (quoting N.J. Civil Serv. Ass'n v.

State, 86 N.J. 605, 613 (1982). Determination of what action best serves "the interests of justice" requires a court to "...consider the relative delay and expense, the necessity for taking evidence and making factual determinations thereon, the nature of the agency and the extent of judgment, discretion and expertise involved." Nero v. Bd. of Chosen Freeholders of Camden City, 144 N.J. Super. 313, 321 (App. Div. 1976) (quoting Roadway Express v. Kingsley, 37 N.J. 136, 141 (1962).

The authority and, indeed, obligation of the Superior Court to decide cases which turn primarily upon an issue of law so as to avoid the needless delay of unnecessary administrative proceedings was forcefully stated by our Supreme Court almost sixty (60) years ago in Nolan v. Fitzpatrick, 9 N.J. 477 (1952). Nolan involved a dispute between the Boulevard Commissioners of the County of Hudson and the Hudson County Board of Chosen Freeholders as to statutory funding requirements. The Nolan Court, upon concluding the issue presented was primarily one of law, and, specifically, statutory construction, concluded exhaustion of administrative remedies was neither necessary nor beneficial. Id. at 486-487.

The Nolan Court explained that the preference for exhaustion of administrative remedies should not be mechanically applied,

> "...because we realized the inconvenience, expense and injustice that must necessarily flow from the arbitrary enforcement of the doctrine of the exhaustion of administrative remedies in each and every case, regardless of

> the circumstances and the interests of justice."

Id. at 485.

The Nolan Court also explicitly recognized that matters which primarily present an issue of law are to be recognized as exceptions to the exhaustion preference under the interests of justice exception. Id. at 486. The Nolan Court explained that:

> On such judicial review of a question of law the opinions of these administrative tribunals would not be persuasive as they would on questions of fact within their purview. The only result of requiring an exhaustion of administrative remedies where only a question of law is in issue would be useless delay, and this in the interest of justice cannot be countenanced.

Id. at 487.

The decision in Nolan is in no way an outlier. In Delaney v. Linen Thread Co., 19 N.J. 578 (1955), the Court was presented with the question as to whether a litigant was required to exhaust all administrative remedies to obtain a determination as to the appropriate amount of disability benefits to which he was entitled. Id. at 580. Justice Brennan, while acknowledging the preference for exhaustion of administrative remedies, concluded an exception was appropriate "...when, as here, the question presented is solely one of law raising an important question of statutory construction." Id. at 581.

In Waldor v. Untermann, 10 N.J. Super. 188 (App. Div. 1950), a similar conclusion was reached wherein the matter presented a

simple factual issue to then be applied to the relevant statute. Id. at 192-193. Specifically, Waldor involved a challenge instituted by a plaintiff taxpayer whom alleged that defendant was unlawfully appointed to the Newark Board of Education because he had not been a resident of Newark for the statutorily required time period. The defendant did not challenge plaintiff's factual assertion but, instead, alleged that plaintiff was first required to exhaust all available administrative remedies. Id. at 189-190.

The Waldor Court concluded that the Law Division did not commit error by refusing to dismiss the complaint. Instead, in light of the discrete factual issue presented which would be applied to the relevant statute, it determined that the lower court appropriately exercised its authority to maintain jurisdiction. Id. at 192-193. See, also Wilbert v. DeCamp, 72 N.J. Super. 60, 68 (1962) (plaintiffs not required to exhaust administrative remedies in absence of factual dispute where issue presented is solely one of law); and Supermarkets Oil Co. v. Zollinger, 126 N.J. Super. 505, 507 (App. Div. 1973) (exhaustion of administrative remedies not required "where interpretation of a zoning ordinance is called for, the issue is a legal one and is particularly suited to the judicial function and resort need not be first had to administrative remedies"); and compare to Gripenburg v. Township of Ocean, 220 N.J. 239, 260-263 (exhaustion of administrative remedies is generally preferred wherein a zoning ordinance is not claimed

invalid in its entirety but only arbitrary and unreasonable in its application to plaintiff's property as detailed fact-finding is required).

The City's motion, in essence, asks this Court for a blank check. Notwithstanding the explicit time limit set forth by the 45 Day Rule, the JCPD, while claiming to be expeditiously pursuing an investigation, did not even schedule Chesler's interview until February 6, 2019, a full 99 days after it was advised of the disposition of the Criminal Case. Should the City's motion be granted, Chesler, whom was suspended without pay for two plus years, would be placed at the mercy of the JCPD as to when the threatened disciplinary charges are filed and then be compelled to wend her way through a litany of administrative proceedings and appeals to recover that to which she is statutorily entitled right now.

Fortunately, the discretion provided to this Court to further the interests of justice will not permit this result. As in Waldor, the sole factual issue needed to determine liability (i.e. when the 45 day charging period expired) cannot reasonably be disputed. This being so, our Supreme Court, dating back to Nolan v. Fitzpatrick has made clear that a question of law (i.e. is the JCPD time barred from issuing new disciplinary charges) is appropriately determined in the Superior Court.

The cynical position espoused by the City is simply delay for the purpose of delay. While well worn, the legal maxim "justice delayed is justice denied"[3] aptly describes the relative hardships presented in this matter and compels this Court to deny the City's motion to dismiss Chesler's Complaint.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that Defendant's Motion to Dismiss Plaintiff's Complaint in Lieu of Prerogative Writ be denied in its entirety.

DATED: February 7, 2019

Respectfully submitted,

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[3] The noted phrase has been attributed to both William Ewart Gladstone and William Penn. See, Laurence J. Peter, Peter's Quotations, p. 276 (1977); and Penn, William (1693) Some Fruits of Solitude, Headley, 1905, p.86.